IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.942 OF 1999

B.A.B. Agro Limited .. Appellant

vs.

Maharashtra State Electricity Board .. Respondent.

Mr.S.A.Bhagwat for the Appellant.

CORAM : A.S.OKA, J.

DATED : 2nd May, 2005.

P.C. :

1. Heard learned Advocate appearing for the appellant. Notice before admission was issued on 7th October,1999. On 15th February, 2005 this Court directed the Appellant to serve private notice on the Respondent. Accordingly, private notice was served by the Advocate for the Appellant on the Respondent by registered post A.D. at the two addresses. As none appeared for the Respondent, on 11th April 2005, this Court directed the Appellant to serve a fresh notice on the Respondent at the Office of the Respondent Board at Bandra(E), Mumbai. Today, service affidavit is filed stating that notice is personally served in the office of the

Respondent Board at Bandra (East) on 19.4.2005. It is stated in the affidavit of service that notice has been also despatched to the Respondent Board at its Pune address. Acknowledgement of the personal service of the notice in the Office of Respondent at Bandra(East) is annexed to the service affidavit which bears the rubber stamp of the clerk of the Respondent Board. None appears for the Respondent.

2. In the suit filed by the Respondent, ex-parte decree was passed against the Appellant. The decree was passed on 2.5.1996. By the said decree, the Appellant was directed to pay sum of Rs.9,68,060.44 to the Respondent with interest thereon at 10% per annum from the date of suit till realisation.

3. The application for setting aside the ex-parte decree was made by the Appellant alongwith application for condonation of delay. Both the prayers in the application were considered together by the learned trial Judge and by impugned Judgment and Order dated 9.8.1999, the learned Judge dismissed the said application.

4. The learned Judge held that as the judgment

was pronounced under Order VIII Rule 5 of the Code of Civil Procedure, 1908 it cannot be an ex-parte judgment. The learned Judge held that there was no sufficient ground to set aside the ex-parte decree and there was no reasonable ground for condonation of delay.

5. The learned Advocate for the Appellant submitted that considering the averments made in the application for setting aside ex-parte decree and the evidence led in the said application, a case for setting aside ex-parte decree was made out. It is submitted that in such matters Courts ought to adopt a liberal approach.

6. The Appellant has come out with the case that the Advocate appointed by the Appellant filed no instructions pursis. It was pointed out that there was a writ petition pending in this Court filed by the Appellant against the Respondent in which challenge was to the tarif structure. The concerned Director of the Appellant who deposed before the Court stated that he was looking after the suit and he suffered from health problems during the period between 1996-98. He produced the medical certificate on record. He stated that the Appellant

came to know about the decree when a letter was received from the Respondent.

7. Though written statement was not filed by the Appellant, from the judgment delivered in the suit it appears that Rule 5 or Rule 10 of Order VIII of the Civil Procedure Code, 1908 was not invoked and in fact Respondent-Plaintiff led evidence by filing an affidavit. The case made out by the Respondent Plaintiff in the claim affidavit on the basis of exhibited documents on record was accepted by the trial Court as evidence had gone unchallenged. Thus, the decree was passed after considering the merits of the case of the Respondent and hence it was not a decree passed by the trial Court by invoking Rule 5 or Rule 10 of Order VIII of the Code of Civil Procedure, 1908. Thus application under Order 9 Rule 13 was maintainable.

8. In application for setting aside ex-parte decree, liberal approach is contemplated especially when there is no negligence on the part of the Defendant. The concerned Director of the Appellant who stepped into witness box has explained as to why he could not look after the suit. In my view, sufficient cause was made out by the Appellant for

condonation of delay and for setting aside the ex-parte decree. Under Order 9 Rule 13 of the said Code, while setting aside the ex-parte decree, the Court can always impose conditions. Considering the fact that the Respondent is a Public body, the learned judge could have imposed condition. In my view, the decree deserves to be set aside subject to condition of the Appellant depositing a sum of Rs.5,00,000/- in the trial Court within a period of eight weeks from today. Hence I pass the following order

a) The impugned Judgment and Order dated 9.8,1999 is quashed and set aside.

b) The decree passed by the learned trial Judge in Special Civil Suit No. 44 of 1996 on 2.5.1998 is quashed and set aside. The suit is restored to file subject to condition of Appellant depositing a sum of Rs.5,00,000/- (Rupees Five Lakhs Only) in the trial Court within a period of eight weeks from today. If the amount is deposited by the Appellant within the stipulated period, the trial Judge will permit the Appellant to file written

statement on or before 1st August 2005. The trial Judge will thereafter proceed to decide the suit finally as expeditiously as possible and preferably on or before 30th April, 2006.

c) In case the amount is not deposited within the stipulated time by the Appellant, the impugned judgment and order shall stand.

d) In case the amount is deposited within the stipulated time, the Respondent Board will be entitled to withdraw the same on furnishing undertaking to refund the said amount with interest as may be directed by the trial Court at the time of final disposal of the suit.

e) The appeal is allowed in above terms with no order as to costs.

. Parties and the concerned Court to act on the authenticated copy of this order.

(A.S.Oka, J.)